STATE OF CALIFORNIA

ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:	)	
	)	
Application for Certification for the	)	Docket No. 98-AFC-3
Delta Energy Center (Calpine Corporation	)	
And Bechtel Enterprises, Inc.)	)	
_____	)	

BRIEF ON DELTA ENERGY CENTER PROJECT ALTERNATIVES

October 18, 1999

DICK RATLIFF
Senior Staff Counsel
California Energy Commission
1516 Ninth Street, MS-14
Sacramento, CA 95814
Phone: (916) 453-1653
FAX: (916) 654-3843
e-mail: dratliff@energy.state.ca.us

STATE OF CALIFORNIA

ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:	)	
	)	
Application for Certification for the	)	Docket No. 98-AFC-3
Delta Energy Center (Calpine Corporation	)	
And Bechtel Enterprises, Inc.)	)	
_____	)	

BRIEF ON DELTA ENERGY CENTER PROJECT ALTERNATIVES

I. INTRODUCTION

The Energy Commission's Committee on the Delta Energy Center has requested briefing on project alternatives. Although it is Staff's understanding that this issue was never identified for adjudication, Staff provides the following brief to address issues that were raised at hearing on October 5, 1999.[1]

II. STAFF RELIES ON THE CEQA GUIDELINES

The project alternatives analysis performed by Staff for siting cases is pursuant to the directives of the Guidelines to the California Environmental Quality Act (Cal. Code of Regs., tit. 14, Secs. 15000 et seq.). These Guidelines implement the requirement of the California Environmental Quality Act (CEQA) to consider alternatives that would avoid or mitigate the significant impacts of a project.

The alternatives analysis required by CEQA has always been one of its more ill-defined areas. However, decisions by the Supreme Court in recent years have attempted to clarify the duties of lead agencies when they perform alternatives analyses. The most important cases defining these duties are Laurel Heights Improvement Association v. Regents of the University of California (1988) 47 Cal.3d 376 ("Laurel Heights I"), Citizens of Goleta v. Board of Supervisors (1990) 52 Cal.3d

[1] The Committee has also indicated in its schedule that briefs may be filed by parties on those topics that were subject to hearing on October 13, 1999. Since the issues that were the subject of that hearing (transmission safety, land use, and visual resources) were not adjudicated and were entirely without controversy, Staff will not brief those issues.

553, and Laurel Heights Improvement Association v. University of California (1993) 6 Cal.4th 1112 ("Laurel Heights II"). The clarifications from these decisions have been incorporated in the CEQA Guidelines, with the most recent and comprehensive amendments to the Guidelines adopted by the Resources agency in 1998.

The revised CEQA Guidelines on alternatives are found in Section 15126.6,[2] which was substantially re-written in 1998. It is useful to focus on the following specific principles in these Guidelines:

1. The purpose of the alternatives analysis is to provide alternatives that achieve the "basic objectives of the project" while avoiding or "substantially lessening" the significant impacts of the project. (Sec. 15126.6(a), (c), and (f)(2).) Presumably no alternatives analysis is required if the project has no impacts that are "significant" as that term is used in CEQA. However, in reality EIRs (rather than negative declarations) are prepared pursuant to CEQA for the very reason that potential significant impacts are anticipated. Moreover, when an agency begins its EIR analysis it often cannot know that a project will not have any significant impacts, and it is thus only prudent that an alternatives analysis be prepared anticipating significant impacts. Finally, the staffs that prepare EIRs (or AFCs) for the decision-maker cannot be certain that the decision-maker will agree that a particular impact is less than significant. This makes the parallel preparation of an alternatives analysis for EIRs (and AFCs) essential. But the fundamental purpose of the analysis—-to avoid or substantially lessen any "significant" impacts-—should not be overlooked.

2. The new Guidelines place emphasis on the requirement that alternatives achieve "most of the basic objectives of the project." (Sec. 15126.6(a), (c), and (f).) Alternatives that do not accomplish this are to be screened from further analysis. (Sec. 15126.6(c).)

3. The "Rule of Reason"—-a term taken from the case law, provides that an EIR (AFC) "set forth only those alternatives necessary to permit a reasoned choice." (Sec. 15126.6(f).) The alternatives "shall be limited to ones that would avoid or substantially lessen any of the significant effects of the project." (Ibid.) Of those alternatives, "the EIR need examine those that attain most of the basic objectives of the project." (Ibid.)

4. Alternatives are to be screened for feasibility and eliminated from more focused consideration where feasibility is doubtful. (Sec. 15126.6(c) and (f)(1).) Some of the factors clearly affecting feasibility are site suitability, economic viability, availability of infrastructure, general plan consistency, other regulatory limitations, jurisdictional boundaries, and whether or not the project proponent has access to the alternative site. (Section 15126.6(f)(1).)

[2] Unless otherwise indicated, all section references are to Title 14 of the California Code of Regulations.

5. The “key question” for alternative sites “is whether any of the significant impacts of the project would be avoided or substantially lessened by putting the project in a different location.” (Sec. 15126.6(f)(2)(A).) Only locations that avoid or substantially lessen significant impacts need be considered. (Ibid.)

III. STAFF’S ALTERNATIVES ANALYSIS IS CONSISTENT WITH THE GUIDELINES.

During the hearing on alternatives, Intervenor Boyd asserted that the Staff’s analysis was defective because (1) it had screened out alternatives for “economic” as opposed to “environmental” reasons, (2) the “smaller” generation project should have been given greater emphasis and designated as “environmentally preferable” to the project, and (3) renewable technologies received too little focus.[3] Each of these contentions is inconsistent with elements of the CEQA Guidelines set forth in the prior discussion.

As is explained in Staff’s testimony, alternative sites were screened for feasibility and site availability, in accordance with the Guidelines. Feasibility under CEQA is an encompassing term: it may be economic, technical, or environmental. (See Sec. 15364 [“feasible” defined to include “economic, environmental, legal, social, and technological factors"].) Thus, intervenor’s comment that only “environmental” grounds can be used to screen alternatives has no basis in CEQA.

Intervenor Boyd also contended that the “downsized” project (one-half of the proposed project size) should be identified as “environmentally preferable,” inasmuch as a smaller project would emit lower air emissions than the proposed project.

However, Staff has not identified any impacts from the proposed project, including those regarding air quality impacts, as “significant” in a CEQA context after mitigation is applied. Mitigation for the air quality impacts of a power plant would be the same for the “downsized” facility as it is for the proposed project: the requirement that the applicant provide the air district offsets that compensate for the proportion of air emissions that a new project will emit.

“A project’s contribution is less than cumulatively considerable [i.e., not a significant cumulative impact] if the project is required to implement or fund its fair share of a mitigation measure or measures designed to alleviate the cumulative impact.” (Sec. 15130(a)(3).) The air quality impacts of the proposed project are potentially significant cumulative impacts. The mitigation—offsets funded by the applicant—-is the programmatic approach used by state and federal government to require proportionate, “fair share” mitigation of air quality impacts.

[3] As this brief is prepared there is no available transcript of the October 5 hearing. Thus memory, rather than a transcript, must be relied upon.

Accordingly, if the project meets air district requirements for Best Available Control Technology (BACT) and provides offsets for its emissions, it has no significant air quality impact. Where there is no significant impact to be avoided, the alternatives analysis becomes essentially irrelevant, as no alternative "would avoid or substantially lessen any of the significant effects of the project." (Sec. 15126.6(a).)

Finally, Intervenor Boyd argued that alternative technologies should have gotten greater focus in Staff's analysis. Staff did consider and discuss "renewable" alternatives, but screened them from more intense scrutiny because they were either infeasible (i.e., no geothermal source locally) or because they failed to meet the well-defined project objective. The applicant's project is, as the record indicates, the response to a specific "request for proposal" (or "RFP") from Dow Chemical Company for a gas-fired generator to provide Dow with both process steam and electricity.

Such an RFP narrowly defines project objectives, and the applicant thus would have to abandon such objectives, and the site and project itself, if it chose to instead build a wind farm or biomass facility. A very narrow and explicit project objective has been upheld by the courts as an appropriate limitation on the alternatives analysis. (Marin Municipal Water District v. K.G. Land Corporation (1991) 235 Cal.App.3d 1652.) Staff has nevertheless tried to provide as broad an alternatives analysis as a cogeneration project of this nature would reasonably allow.

Date: October 18, 1999

Respectfully submitted,

_____

DICK RATLIFF
Senior Staff Counsel